FILED
MAR 6 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS OF COURTS BELOW

The opinion of the Circuit Court of Appeals, Third Circuit, appears at R. 101-106, and is officially reported in 86 F. (2d) 913. The opinion of the United States District Court for New Jersey appears at R. 29-31 and is officially reported in 16 F. Supp. 949.

JURISDICTION OF THIS COURT

The final decree of the Circuit Court of Appeals is dated December 1, 1936 (R. 107). Petition for certiorari was brought pursuant to Section 240(a) of the Judicial

Code, as amended by the Act of February 13, 1925 (Act of Cong., Feb. 13, 1925, c. 229, § 1; 43 Stat. 936, 938; 28 U. S. C. § 347) and Section 25 of the Bankruptcy Act of 1898 (Act of Cong., July 1, 1898, c. 541, § 25; 30 Stat. 544, 553; 11 U. S. C. § 48). Certiorari was granted by order of this Court dated February 15, 1937 (R. 149).

STATEMENT OF THE CASE

William Fox was adjudicated a voluntary bankrupt on May 29, 1936, by the United States District Court for New Jersey (hereinafter called "the bankruptcy court"). Petitioner was appointed trustee in bankruptcy and duly qualified as such (R. 3, 9-10, 53, 94).

Respondent, All Continent Corporation, a Delaware corporation maintaining its office and principal place of business at Atlantic City, New Jersey (R. 3, 8, 10, 15, 83), appeared in said bankruptcy proceeding and filed proof of claim for the sum of $417,258.19 as an alleged creditor of William Fox on June 19th, 1936[1] (R. 8, 15). The claim

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[1]This date of filing and the exact amount of the claim appear only from the record lodged with the Clerk of this Court in the *Matter of the Petition of Hiram Steelman, Trustee, etc., for a Writ of Prohibition against and/or a Writ of Mandamus to the Hon. George A. Welsh, District Judge of the United States for the Eastern District of Pennsylvania, and the said Court*, October Term, 1936, Original as yet unnumbered, p. 20. This record is hereinafter referred to as "*Matter of Steelman, R.*". It is well settled, however, that this Court takes judicial notice of matters appearing in its own records. This is especially done where those records relate to the same parties and related litigation.

Craemer v. *Washington State*, 168 U. S. 124, 129;
Washington & Idaho Railroad Co. v. *Cœur d'Alene Railway and Navigation Co.*, 160 U. S. 101, 102-103;
Fritzlen v. *Boatmen's Bank*, 212 U. S. 364, 370-371;

of All Continent Corporation for this same sum was listed as a liability by William Fox in the schedules filed at the time of his petition in bankruptcy (R. 44, 79).

The only assets turned over to the trustee consisted of $100 in cash, and certain notes, claims and securities upon which petitioner has been unable to realize any funds and which after investigation appear to be worthless,[2] although listed at a sum in excess of $1,000,000. Listed liabilities were in excess of $9,000,000 (R. 8-9, 15-16).

Orders were entered directing examination of All Continent, and certain of its officers, directors, accountants and bookkeepers pursuant to § 21(a) of the Bankruptcy Act (Act of Cong. Feb. 5, 1903, c. 487, § 7, 32 Stat. 798; 11 U. S. C. § 44(a)). Such examination was diligently conducted through July and August of 1936 (R. 3, 10, 67). Examination of the bankrupt is still in progress; but examination of All Continent has been effectively blocked by the refusal of its president (who was and is also the wife of the bankrupt) to submit to such examination. She was thereupon cited for contempt by the referee (R. 3, 6, 10, 13).

U. S. v. *California Coöperative Canneries*, 279 U. S. 553, 555-556;
National Fire Insurance Co. v. *Thompson*, 281 U. S. 331, 336-337.

Such notice has not been limited to matters appearing of record in cases previously adjudicated, but has been taken as well of matters appearing in the record of a case pending before this Court.

West Ohio Gas Co. v. *Public Utilities Commission of Ohio* (*No. 1*), 294 U. S. 63, 70-71.

[2]As a matter of fact, the bankrupt had denuded the estate of funds for the very purpose of alimenting his own and All Continent's attorneys, having paid them, at or about the time of filing his petition, $7,500 out of his alleged remaining $7,600 of cash (R. 8, 15, 80).

In the course of the examinations under § 21 (a), the referee found that a thorough examination and audit of the respondent's books was "absolutely necessary to the proper administration of the estate of the bankrupt" (R. 5, 12). This conclusion was based upon the following facts, as summarized by the referee (R. 4-5, 11-12):[5]

> "The All Continent Corporation, whose books and records are here sought to be examined, was the creation of the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disbursements for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in which the bankrupt or the corporations which he owned, were involved; * * *; this

[5]Categorical sworn statements substantially to the same effect appear in *Matter of Steelman*, R. 4-5.

> chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the Trustee of the books and records of the All Continent Corporation."

Accordingly, the referee ordered All Continent to make its books available for such examination.[4] Proceedings by All Continent to review said order are now pending (R. 5-6, 12-13).

Hearings in the bankruptcy proceedings upon the issue as to the identity of All Continent and the bankrupt, presented by All Continent's proof of claim and the objections thereto, have been delayed pending completion of the § 21(a) examinations and audit of books of All Continent (R. 5-6, 12-13). These have in turn been delayed by the refusal of the bankrupt's wife (who is also the president of All Continent) (R. 3, 6, 10, 13) and the refusal of Herbert Leitstein, another officer and the bookkeeper of All Continent (who is also the personal secretary and bookkeeper of the bankrupt) to testify therein, for which refusal both the bankrupt's wife and the said bookkeeper have been cited to the bankruptcy court for contempt (R. 6, 13; *Matter of Steelman*, R. 16), and by the refusal to make the books of All Continent available for such examination (R. 5-6, 12-13), which refusal is now subject

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[4]This order was approved by the district court with modifications affecting only the manner of conducting the examination. *In re Fox*, 16 F. Supp. 950.

to review by the Circuit Court of Appeals, Third Circuit (*Matter of Steelman,* R. 17).

At this stage in the bankruptcy proceedings, All Continent, in September, 1936, without first obtaining leave of the bankruptcy court, instituted a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called "the Pennsylvania suit") in which it joined petitioner as an absentee defendant pursuant to Section 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. § 118) (R. 6-7, 13-14, 26-27, 31; *Matter of Steelman,* R. 17-19). The stated purpose of the Pennsylvania suit was to remove an alleged cloud on title to certain securities placed in the possession of Philadelphia brokers (Sparks & Co.) in the name of All Continent shortly prior to the filing of the petition in bankruptcy (R. 19, 23). The alleged cloud on title consisted of a third-party subpoena issued out of the United States District Court for the Southern District of New York on March 27, 1936, in supplementary proceedings by Capital Company, a judgment-creditor of the bankrupt William Fox[5] (R. 20, 22-23, 24-26). The said third-party subpoena contained an injunction, pursuant to New York statute (Civil Practice Act § 781, Laws of 1935, c. 630), restraining the brokers from transferring any property of William Fox, the judgment-debtor[6] (R. 25-26), and it was alleged that, pursuant thereto, the brokers re-

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[5]The contempt of William Fox in disregarding a similar subpoena in the same supplementary proceedings was recently before this Court. *Fox* v. *Capital Company,* 299 U. S. 105.

[6]The validity of the subpoena was upheld by the Circuit Court of Appeals, for the Second Circuit, in *Capital Co.* v. *Fox,* 85 F. (2d) 97.

fused to transfer the aforesaid securities in their possession in the name of All Continent (R. 22).

On September 9, 1936, the day set for hearing on the review of the referee's order directing All Continent to submit its books for audit (R. 6, 13), petitioner, as trustee, though not a resident of, nor found within, the Eastern District of Pennsylvania (R. 18, 27; *Matter of Steelman*, R. 6), was served in Atlantic City, New Jersey, with a subpoena issued out of the United States District Court for the Eastern District of Pennsylvania, in the Pennsylvania suit (R. 6-7, 13; *Matter of Steelman*, R. 19). On September 18, 1936, petitioner, not having been found within said Eastern District of Pennsylvania and not having voluntarily appeared in said Pennsylvania suit, was served with a copy of an order to plead entered in said proceedings upon motion of All Continent (R. 7, 14, 26-27).

It being apparent, as stated by the district judge in his opinion (R. 30), that the effort by All Continent in the Pennsylvania suit was "to force the trustee to appear and litigate the entire question now before this Court in the bankruptcy proceedings, that is, whether actually the property and assets of [All Continent] Corporation belong to the bankrupt", and that "Such litigation as against [All Continent] Corporation, if ultimately deemed advisable, ought to be conducted by trustee after there has been a full and complete disclosure of the facts in the § 21(a) examinations," petitioner as trustee applied to the bankruptcy court for an injunction restraining All Continent from further prosecuting said action against petitioner (R. 2-28).

Respondent filed no answer to the trustee's petition, but on September 25, 1936, moved in the bankruptcy court to dismiss it on the grounds that the bankruptcy court (1) was without jurisdiction to grant the relief requested; (2)

had no power to grant such relief; and (3) was required by principles of comity not to interfere with the process of the court in the Eastern District of Pennsylvania (R. 28-29). The bankruptcy court, being of the opinion that the trustee was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate" (R. 32), handed down a decree on October 7, 1936, which enjoined and restrained All Continent from further prosecuting said Pennsylvania suit against the trustee (R. 31-32).

Thereafter, on October 13, 1936, the trustee, with the approval of the bankruptcy court, instituted a plenary suit in the Chancery Court of New Jersey against All Continent; William Fox, the bankrupt; Eva Fox, his wife; Mona and Belle Fox, his daughters; and other members of his family; in which the trustee sought to set aside certain conveyances, transactions and transfers between the bankrupt and his wife, between the bankrupt and All Continent, and between the bankrupt and each of his daughters, so that the trustee might become vested with title to the assets which he claimed were properly assets of the bankrupt estate (R. 36-88; *Matter of Steelman*, R. 22). The assets sought in this action included not only the securities involved in the Pennsylvania suit but all of the other assets held in the name of All Continent and the very stock of All Continent registered in the name of the bankrupt but claimed by the bankrupt's wife, Eva Fox (R. 36-55).

On appeal from the restraining order issued by the bankruptcy court against All Continent, the Circuit Court of Appeals, over the trustee's objection, permitted respond-

ent (there appellant) to incorporate into the record the bill of complaint in the New Jersey Chancery suit, the affidavit of the trustee submitted in support of said bill of complaint, the order to show cause issued by the Chancery Court of New Jersey in the trustee's suit restraining All Continent and the other defendants in that action from disposing of the property therein involved, the answer interposed by J. W. Sparks & Co. in the Pennsylvania suit and the notice of motion of Capital Company to quash the writ of subpoena in the Pennsylvania suit (R. 35-100).

The New Jersey Chancery bill of complaint reveals that the trustee seeks to recover all of the property of All Continent, and all of the capital stock of All Continent, as property of the bankrupt estate, on the following grounds: (a) that All Continent has no separate existence or identity and in fact is merely the bankrupt himself doing business under the guise of the corporate form; (b) that the original transfer of assets of a then market value of $7,000,000, and all subsequent transfers from the bankrupt to All Continent were colorable only; (c) that the original transfer of the $7,000,000 and all subsequent transfers from the bankrupt to All Continent were made without consideration and in fraud of creditors of the bankrupt; (d) that the purported transfer from the bankrupt to his wife of all the stock of All Continent was colorable only; and (e) that the said purported transfer from the bankrupt to his wife of all of the stock of All Continent was made in fraud of the creditors of the bankrupt (R. 36-88).

The Circuit Court of Appeals reversed the decree of the bankruptcy court and vacated the restraining order on the ground that the bankruptcy court was without power to enjoin respondent from further prosecuting the Pennsylvania suit against the trustee, for the reason that the

court in the Pennsylvania suit had acquired exclusive jurisdiction by virtue of Section 57 of the Judicial Code. It is this decree of the Circuit Court of Appeals which your petitioner now seeks to have reversed.

In the course of its opinion, the Circuit Court of Appeals undertook to discuss not only the issue before it, but also to review the matter contained in the supplemental record and to express its views by *obiter dicta* upon numerous questions which have arisen or are likely to arise hereafter between respondent and your petitioner with respect to said Chancery Court suit and other proceedings. This phase of the case is discussed more in detail later in this brief, and said *dicta* are there specifically set forth (see pp. 51-64, *infra*).

By these *dicta* the Circuit Court of Appeals has prematurely expressed its opinion (1) that the subpoena of the New York court is a "cloud on title"; (2) that the Pennsylvania court is the only court that can remove such "cloud"; (3) that the controversy between All Continent and the trustee is the same in the Pennsylvania suit as in the New Jersey Chancery suit; (4) that the New Jersey Chancery suit sets forth two "separable controversies"; (5) that the trustee must prove all of the averments of his New Jersey Chancery bill which relate to All Continent, in order to establish his ownership of the comparatively small group of All Continent's assets involved in the Pennsylvania suit; (6) that the trustee cannot establish his right to that part of the assets of All Continent involved in the Pennsylvania suit without establishing his right to all of the assets of All Continent; (7) that the decision to be entered by the Pennsylvania court in the suit there instituted by All Continent will be binding upon the trustee "in every other court in which that question might be litigated between the parties";

(8) that the Pennsylvania court is entitled to exclusive jurisdiction over the controversy between the trustee and All Continent; (9) that maintenance of this exclusive jurisdiction justifies the issuance of an injunction to "restrain the trustee from litigating the controversy elsewhere"; (10) that Capital Company is seeking the securities involved in the Pennsylvania action for itself; and (11) that it is the official duty of the trustee voluntarily to appear in the Pennsylvania court and there defend the suit brought by All Continent.

None of these matters was necessarily involved in the issue presented on the appeal and none, therefore, was argued by the Trustee, whose rights were thus adversely prejudged by the Circuit Court of Appeals.

QUESTIONS PRESENTED

The question presented by the *decision* of the Circuit Court of Appeals is whether a court of bankruptcy has *power* to enjoin a creditor (in this case a corporation all of the stock of which is owned either by the bankrupt or by his wife) from prosecuting, as against the trustee, a suit under § 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court properly determines that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate.

The question presented by the prejudicial *dicta* of the Circuit Court of Appeals is whether it is a proper function of an appellate court to express its opinion upon numerous questions not presented by the record before it, not argued

or briefed by counsel in the case before it, and which may in the ordinary course of litigation never come before it, in effect prejudging and thereby prejudicing the parties to the litigation in securing a fair hearing upon such questions when properly presented in the lower courts.

SPECIFICATION OF ERRORS AND SUMMARY OF ARGUMENT

Petitioner relies on each of the three errors assigned in the petition for certiorari. The following summarizes his argument in support thereof:

I.

THE BANKRUPTCY COURT HAD *Power* TO GRANT THE INJUNCTION.

The general powers of the bankruptcy court are broad enough to protect every right and to prevent any wrong connected with the bankrupt estate and its administration, GILBERT'S COLLIER ON BANKRUPTCY (4th Ed. 1937), page 73. The power to issue an injunction, when necessary to prevent the defeat or impairment of the jurisdiction of the bankruptcy court, is inherent in such court as a duly established court of equity, *Continental-Illinois Bank* v. *Chicago, etc. Ry. Co.*, 294 U. S. 648.

While examinations were being conducted under § 21(a) of the Bankruptcy Act to determine (among other things) whether there was a defense to the claim filed by All Continent, and whether the assets of All Continent could be recovered for the estate on the ground that that corporation was (a) a mere dummy or *alter ego*, or (b) a fraudulent transferee of the bankrupt, All Continent insti-

tuted a *quasi in rem* proceeding in Pennsylvania. This suit was designed and calculated to provide a conclusive determination of the issues under investigation in the bankruptcy court before that investigation could be completed. As it was an interference with the orderly administration of the bankruptcy court, the latter had power to enjoin it. *Cf. Local Loan Co.* v. *Hunt*, 292 U. S. 234.

II.

THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION.

This is true, whether the case be determined simply on the record presented to the bankruptcy court, or by the aid of the further facts shown in the supplemental record admitted on motion of All Continent in the Circuit Court of Appeals, or in the petition for prohibition or mandamus pending in this Court in *Matter of Steelman*.

All Continent had filed a substantial claim in the bankruptcy proceedings, thereby submitting itself to the bankruptcy jurisdiction and constraining the trustee to prepare defenses to the claim. Such defenses would include evidence that All Continent was but the *alter ego* of the bankrupt, that All Continent had no assets separate from those of the bankrupt, and that, if it had such assets, they had been fraudulently transferred to it by the bankrupt. All of these defenses had already been *prima facie* established as the result of the § 21(a) examination, and the referee had so reported. At that point, the § 21(a) examination of All Continent was interrupted by the refusal of its president (who was also the wife of the bankrupt) to testify and turn over the books of the corporation for audit by the trustee.

Moreover, the bankrupt's scheduled liquid assets ($100) were utterly insufficient to permit the trustee adequately and properly to defend the Pennsylvania suit. In effect, the entire conduct of the bankrupt, of his wife, and of All Continent is indicative of a continuing conspiracy between them to impede and to obstruct the bankruptcy court and to harass and defraud the creditors of the bankrupt.

The Pennsylvania action involved only a part of the assets, and only a few of the issues involved both in the trustee's resistance to the proof of claim in the bankruptcy court, which first had jurisdiction, and in the subsequent plenary proceeding instituted by the trustee in the Chancery Court of New Jersey.

Indeed, although the proposition be unnecessary to the decision of this case, it may well be that the filing of the claim by All Continent, in the circumstances of this case, confers upon the bankruptcy court an exclusive jurisdiction over the controversy presented in the Pennsylvania suit.

III.

The Prejudicial *Dicta* of the Circuit Court of Appeals Require the Exercise of This Court's Power of Supervision.

The opinion of the Circuit Court of Appeals contained eleven *dicta*, outlined in the Statement, *supra*, pp. 10-11. Ordinarily, the inclusion of *dicta* in an opinion below does not call for review by this Court. But the number of these *dicta* is so great and their effect upon the entire future course of the bankruptcy proceeding so substantial, as to render the present case one in which this Court may well be called upon to exercise its power to correct extreme de-

partures by the courts below from the accepted and usual course of judicial proceedings.

The attempt by the Circuit Court of Appeals to determine prematurely, without benefit of argument, that the Pennsylvania court has exclusive jurisdiction of the entire controversy between All Continent and the trustee, and therefore has power to enjoin the conduct of the plenary suit instituted by the trustee in the New Jersey Chancery Court, is particularly prejudicial.

Other *dicta* of less moment include a plain statement that the plenary suit instituted by the trustee is removable to a Federal court (a question over which the Circuit Court of Appeals has no power even of appellate review); a statement that the Pennsylvania court is the only court empowered to remove the alleged "cloud" on the title of All Continent to the securities in Pennsylvania (thereby ignoring the power of the United States District Court for the Southern District of New York, which itself created the alleged "cloud," to remove the same); a statement that it would be a *breach of duty* on the part of the trustee not to appear in the Pennsylvania court (quite apart from the fact that the bankrupt left to the trustee only $100 in cash with which to administer the entire estate, and that the machinery for an economical determination of all issues, including those involved in Pennsylvania, had already been set in motion in the bankruptcy court); and other erroneous statements.

All of the *dicta* are particularly prejudicial, as the Circuit Court of Appeals acts as the reviewing court from the three different courts in which various proceedings must be had in the future (the bankruptcy court, the United States District Court for the Eastern District of Pennsyl-

vania, and the United States District Court for the District of New Jersey, sitting in equity pursuant to the removal thereto of the plenary proceeding). All of these courts are thereby instructed in advance as to the opinion of the Circuit Court of Appeals on many points not yet presented or argued there, but which may be determinative in the future of the issues between All Continent and the trustee.

The obvious propriety of denying to the bankrupt, his wife, and All Continent (the conduct of all of whom in the bankruptcy proceedings has been contemptuous and obstructive) benefit from these erroneous and premature pronouncements of the court below, appears peculiarly to justify supervisory review by this Court in this case, expressly revising and rejecting the *dicta* below.

POINT I

THE BANKRUPTCY COURT HAD POWER BY INJUNCTION TO RESTRAIN INTERFERENCE WITH THE EXERCISE OF ITS JURISDICTION IN ADMINISTERING THE BANKRUPT ESTATE.

The decision of the Circuit Court of Appeals, here under review, reversed the decision of the bankruptcy court granting an injunction, *solely* on the ground of want of power. The opinion concludes (R. 106):

> "Under the facts in this case, the District Court of New Jersey did not have power to restrain the suit which the statute clearly authorized to be brought in the Pennsylvania court."

This was appropriate to the Court's opening statement of the question at issue (R. 104):

> "The real question in issue here is whether or not the New Jersey Court had the power to enjoin the appellant from prosecuting its suit, under the facts of this case, in the Pennsylvania Court."

And respondent's counsel in their brief in opposition to the petition for certiorari herein (p. 4) agreed that the question was one of "power" and that the Circuit Court of Appeals had decided that "the District Court was without power to enjoin the Pennsylvania suit."

Speaking generally, GILBERT'S COLLIER ON BANKRUPTCY (4th Ed., 1937) p. 73, says:

> "The power to enjoin is exercised under a wide variety of circumstances, which cannot readily be classified. This necessarily follows from the fact that the power is broad enough to protect every right and prevent every wrong connected with the bankrupt estate and its administration."

This power is derived partly from the inherent powers of a court of equity, with which bankruptcy courts are vested, and partly from the omnibus authorization of § 2 (15) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 2, 30 Stat. 545; 11 U. S. C. § 11):

> "The courts of bankruptcy as defined in the previous chapter" * * * are invested, within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * *, to * * *
>
> "(15) make such orders, issue such process, and enter such judgments in addition to those specifically

provided for as may be necessary for the enforcement of the provisions of this title; * * *"

Among the powers specifically granted to bankruptcy courts by other subdivisions of this same section, the exercise of which may be protected by injunction issued pursuant to Subdivision 15, are the powers to:

"* * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

"* * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

"* * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"* * * (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; * * *"

This Court has recently considered the injunctive power of bankruptcy courts in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, which involved the reorganization of an insolvent railroad debtor under § 77 of the Bankruptcy Act as amended in 1933 (Act of Cong., Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, 11 U. S. C. § 205). The bankruptcy court had enjoined the sale of collateral held by the payees of various short term notes of the debtor railroad where it appeared "that the value of the collateral securing each of

the outstanding notes is substantially in excess of the loan thereby secured;" and "that if holders of the notes should sell the collateral it would cause a substantial and irreparable loss to the trust estate" (294 U. S. at p. 657). This Court unanimously affirmed the injunction decree of the bankruptcy court, upholding by broad language the "power" of a court of bankruptcy to act by injunction when facts are presented which call for the exercise of such power. Although this Court was there dealing with a reorganization under § 77, and not with an individual bankruptcy, and although this Court carefully refrained from expressing any opinion as to the propriety of an injunction in an "ordinary bankruptcy proceeding" in the circumstances there presented, the opinion made it clear that no distinction, practical or even theoretical, could be made between bankruptcies on the one hand, and insolvencies such as form the basis for petitions under § 77 on the other (pp. 668-675). It was pointed out (at p. 668) that:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The following extracts from the opinion,—the last word of this Court on the subject—are, therefore, instructive:

> "By § 2 of the Bankruptcy Act (U. S. C. Title 11, § 11), courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity, and their proceedings inherently proceedings in equity, the words 'at law' probably having been inserted

> only with regard to clause (4) of § 2, which confers authority to arraign, try, and punish bankrupts and others for violations of the act. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240. Their adjudications and orders constitute in all essential particulars decrees in equity. *Idem.* 241. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principle."
>
> * * * * * *
>
> "The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of § 2 (15) of the Bankruptcy Act or of § 262 of the Judicial Code" (p. 676).

The Court further made it clear not only that the bankruptcy court had "power" to issue the injunction, but that the manner of exercising its discretion was not reviewable on appeal unless abuse of discretion appeared:

> "A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised" (p. 677).

The lower courts have frequently exercised their injunctive power to restrain the sale, removal or other disposi-

tion of property in the possession of adverse claimants, however substantial the adverse claim, where it has been made to appear that the trustee or receiver in bankruptcy either has asserted or is about to assert a bona fide claim to recover such property for the bankruptcy estate on the ground of a prior fraudulent transfer or some other ground.

In re Currier, 5 A. B. R. 639 (W. D. N. Y., 1901, Hotchkiss, Referee);
Beach v. *Macon Grocery Co.,* 116 Fed. 143 (C. C. A. 5th, 1902);
In re Mitchell, 278 Fed. 707 (C. C. A. 2d, 1922);
In re Mills, 179 Fed. 409 (E. D. N. Y. 1910);
In re Miller, 118 Fed. 360 (E. D. Ga. S. D. 1901);
In re Norris, 177 Fed. 598, (W. D. N. Y. 1910).

The last-named case expressly states the rule which seems necessarily to follow from the language of this Court in such cases as *Harrison* v. *Chamberlin,* 271 U. S. 191. In establishing the test to govern trustees in determining whether to bring plenary proceedings, this Court there directed that plenary proceedings should be brought where the adverse claim was "substantial" and not "merely colorable" and said that:

> "it is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense" (271 U. S. at p. 195).

It follows that the trustee must make a "preliminary inquiry" in order to ascertain of which character the adverse claim is. The making of this inquiry must be protected, if necessary, by injunction against precipitate action by the adverse claimant designed to forestall or defeat the inquiry. Thus, it was said in the *Norris* case, 177 Fed. 598, that:

> "The court has power to ascertain, if an adverse claim be made by a third person in possession of the property, whether such claim is in fact well-founded, or if it is fictitious or colorable".

This was precisely what was done in the present case, as § 21(a) examinations were diligently pressed, until obstructed by All Continent itself and its officers (including particularly the wife of the bankrupt). Before the bankruptcy court could complete its inquiry as to whether the adverse claim of All Continent was "in fact well-founded", or (if not necessarily well-founded) was at least so "substantial" as to require plenary proceedings, or finally, was "merely colorable", the Pennsylvania suit was commenced. This is certainly an appropriate situation for the exercise by a bankruptcy court of its power to enjoin the prosecution of a foreign suit.

This Court has laid down the principle in broad terms that the injunctive power of the bankruptcy court includes jurisdiction to restrain the prosecution by creditors or adverse claimants of litigation in state courts, or other courts outside the bankruptcy court, when it is made to appear that such litigation either will interfere with the administration of the bankruptcy proceedings in the bankruptcy court or will substantially and practically frustrate the purpose of the bankruptcy proceedings. *Local Loan Co.* v.

Hunt, 292 U. S. 234. In that case a bankrupt who had given an assignment of future wages as security for a loan negotiated prior to bankruptcy, had been subsequently discharged in the bankruptcy proceedings from all provable debts and claims. Immediately after entry of the order of discharge, his creditor, who held the wage assignment, instituted an action against the bankrupt's employer in an Illinois state court to enforce the assignment with respect to wages earned after the discharge. It appeared that the Illinois Supreme Court had declared such assignments valid as to future wages in a case which would constitute a binding precedent for the lower Illinois state courts. This Court affirmed an order of the bankruptcy court granting an injunction restraining the holder of the assignment from prosecuting his action in the state court, on the ground that the Illinois rule upholding the validity of such assignments was inconsistent with the purpose of the Bankruptcy Act, and that even though the bankrupt might properly intervene in the Illinois state court action and there assert the invalidity of such assignment as a defense in the action in the state court, resort by the bankrupt to that method of protecting his rights would require him

> "to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined * * *" (p. 241).

This Court observed that the amount in suit was small and concluded that the remedy by intervention and defense in the state court was

> "entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves." (p. 242).

In line with the policy indicated by this Court's decision in *Local Loan Co.* v. *Hunt,* we find that the lower courts have often enjoined collateral litigation of bankruptcy controversies outside of the bankruptcy courts, and under a variety of different circumstances:

In re Trayna & Cohn, 195 Fed. 486 (C. C. A. 2d, 1912), in which a bankruptcy court enjoined a state court action for conversion brought against the receiver after plaintiff in the state court had already made an application to the bankruptcy court for payment out of the fund allegedly converted and had defaulted on the hearing.

In re Perl, 28 F. (2d) 1002 (W. D. Pa., 1928), in which the bankruptcy court enjoined a judgment creditor of the bankrupt from collecting his judgment, rendered prior to bankruptcy, from a fund on deposit in the state court, until the question could be determined in the bankruptcy proceedings whether the judgment, rendered on confession, constituted a preference.

In re Hornstein, 122 Fed. 266 (N. D. N. Y., 1903), in which the bankruptcy court enjoined a sheriff who held property by virtue of an attachment in an action involving a chattel mortgage from arguing an appeal from the judgment in favor of the attachment creditor in the state court pending the appointment of a trustee and the lapse of sufficient time to enable such trustee to proceed in the bankruptcy court to recover either the mortgaged property or its value.

In re Nathan Turim, Inc., 55 F. (2d) 672 (S. D. N. Y., 1931), in which the court stated that it had jurisdiction in aid of bankruptcy proceedings to enjoin adverse claimants from suing the bankrupt's debtor in the state court upon the bankrupt's assignment, although it held in the particular circumstances that it was not justified in ordering the payment of the debt claimed by the bankrupt's estate into court pending the outcome of a plenary suit.

In re Republic Plumbing Supply Corporation, 295 Fed. 573 (E. D. N. Y., 1924), in which the court denied the trustee's application for an injunction restraining an adverse claimant to whom the bankrupt had transferred promissory notes from prosecuting an action on such notes in the state court, but conditioned such denial on the transferee consenting to deposit in the bankruptcy court the proceeds of his action and stipulating that no determination by the state court should be *res judicata* in the actions contemplated but not yet instituted by the Trustee to set aside the transfers.

The rationale of all of these cases is that the bankruptcy court by virtue of its inherent equity jurisdiction, and the jurisdiction granted to it by § 2 of the Bankruptcy Act, is vested with power to prevent any party to the bankruptcy proceedings, whether creditor, member of the bankrupt's family, adverse claimant, or otherwise, from interfering either with the orderly administration of the bankrupt estate or with the accomplishment of the purposes of the Bankruptcy Act, and that this power may be exercised in the discretion of the bankruptcy court through the medium of an injunction such as that issued in this case.

POINT II

THE BANKRUPTCY COURT IN THIS CASE PROPERLY EXERCISED ITS POWER TO RESTRAIN INTERFERENCE.

Facts justifying the exercise of its injunctive power by the bankruptcy court in this case will be found (1) in the trustee's petition which was before the District Court when the order was granted (R. 2-28), (2) in the so-called "Supplemental Record", which was printed by permission of, and considered by, the Circuit Court of Appeals on motion of All Continent, in addition to the matter which had been before the bankruptcy court (R. 35-100), and (3) in the record in *Matter of Steelman* in this Court.[7]

A. The facts before the bankruptcy court in the trustee's petition justified the exercise of its injunctive power.

The facts in the petition which was before the bankruptcy court (which must be deemed to have been admitted by respondent's motion to dismiss the petition) are as follows:

(a) All Continent filed a claim in the bankruptcy proceedings for moneys claimed to be due to it from the bankrupt (R. 8, 15);

(b) Examinations under Section 21(a) of the Bankruptcy Act of the bankrupt and of the officers of All Con-

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[7]The trustee's petition in *Matter of Steelman* was accompanied by a petition for a temporary restraining order and a temporary injunction. To this All Continent has filed a reply in this Court, but has not therein called in question the truth of any of the facts alleged by the trustee in his petition. Indeed they could not well be questioned, for all are taken directly or by compelling inference from Court records.

tinent had been seasonably commenced and had been diligently prosecuted by the trustee and the creditors (R. 3-10);

(c) The facts already developed in the § 21(a) examinations indicated a strong probability that All Continent is merely the *alter ego* of William Fox (R. 4-5, 7-8, 11-12, 14-15);

(d) Upon the facts developed in the § 21(a) examinations, the referee had directed the production of All Continent's books for audit along with those of the bankrupt (R. 4-5, 11-12);

(e) In directing the production of All Continent's books, the referee had filed a report in which he found that such facts had already been developed as to justify the conclusions, among others, that:

> "from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of the corporation as his own; * * * the bankrupt was undoubtedly the guiding spirit in all affairs of the corporation throughout its entire corporate existence; * * *" (R. 4, 11);

(f) Diligent prosecution of the § 21(a) examinations of All Continent had been interrupted by the refusal of the president of All Continent, who was and is also the wife of the bankrupt,[8] to submit to examination concerning All

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[8] § 21(a) of the Bankruptcy Act expressly provides for examination of a bankrupt's wife, as follows:

> "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act. * * *"

Continent's affairs, for which she was cited for contempt by the referee (R. 6, 13);

(g) The bankrupt's schedules showed only $100 in cash, and accordingly the liquid assets of the estate were utterly insufficient to permit the Trustee adequately and properly to defend the Pennsylvania suit (R. 8-9, 15-16).

1. *The trustee was diligently proceeding in his investigation of the facts which would be determinative of any controversy between All Continent and himself. The bankruptcy court, therefore, rightly exercised its power to enjoin the premature determination of that controversy in a suit by All Continent in another jurisdiction.*

The authorities discussed in Point I, *supra*, pages 16 to 25, established the bankruptcy court's *power* to enjoin the determination of issues raised by adverse claimants for a reasonable time to allow the trustee to present such issues for determination by the bankruptcy court. The exercise of this power is particularly appropriate where, as here, the trustee is proceeding with due diligence toward the presentation of those issues to the bankruptcy court.

The examination of witnesses under § 21(a) commenced eleven days after the appointment of the trustee, and continued almost daily for the next two months (R. 3, 10). In so far as information concerning the true nature of the relationship between All Continent and the bankrupt was concerned, the trustee was prevented from obtaining such information solely by the acts of All Continent itself. Not only did All Continent refuse to comply with the order of the referee to submit its books for examination and audit, but its president, Eva Fox, the wife of the bank-

rupt, refused to submit to any examination concerning its affairs (R. 6-13).[9]

In spite of this, All Continent complained in the Pennsylvania court that irreparable damage would result if it were required to await action by the trustee (R. 23). Yet even the Pennsylvania suit involves only a small fraction of its assets (certain shares of stock placed with a broker in Philadelphia).

In plain effect, All Continent took advantage of the fact that a small fraction of its assets were located in Philadelphia, in its endeavor to head off the trustee by getting a conclusive determination in a foreign *in rem* proceeding before he could fully ascertain the facts in the bankruptcy proceedings, and before he could institute a comprehensive plenary action involving *all* the assets.

The scheme of All Continent is palpable. With one arm, its president holds off the bankruptcy court by going into contempt,—refusing to testify and refusing to produce its books—while with the other its attorneys rush forward a *quasi in rem* proceeding in a foreign jurisdiction of their own choice.[10]

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[9]The trustee included in his sworn petition the statement that, by its institution of the Pennsylvania suit, All Continent was "endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of the affairs of this bankrupt estate, * * *" particularly his efforts and activities "looking toward the discovery and acquisition of assets in said estate, * * *" (R. 8, 14-15).

[10]Indeed, change of Federal jurisdictions is the established technique of the Fox family to harass and delay creditors. Fox left his two New York homes and established himself at the Claridge Hotel in Atlantic City in order to defeat the jurisdiction of the Southern District of New York and the Second Circuit (*Fox* v. *Capital Co.*, 299 U. S. 105). He then filed in bankruptcy in New Jersey with only $100

The power of the bankruptcy court to protect the orderly administration of bankrupt estates is hollow indeed if in this, or in any other case, it cannot enjoin such proceedings. Personal property such as here involved may easily be taken secretly into different jurisdictions by a fraudulent transferee who may in fact be merely the bankrupt himself doing business in the corporate form. An action or actions may then be brought by such transferee in a foreign jurisdiction or jurisdictions to destroy claims of the trustee as constituting clouds on title. If the power to enjoin be non-existent, this provides a simple method to harass the trustee and to compel him to interrupt his diligent administration of the estate. He may thus be forced to litigate, at great and perhaps prohibitive expense to the estate and creditors, and at the convenience of the transferee, the issue of ownership in a jurisdiction chosen by the transferee and perhaps far removed from the bankruptcy court, at a time when the trustee may not have had an opportunity adequately to educate himself or prepare his defense. Certainly the bankruptcy court is not powerless to prevent such abuses.

2. *The bankruptcy court, by receipt of All Continent's proof of claim, had acquired jurisdiction over all phases of the controversy between All Continent and the trustee, and properly exercised its discretion to enjoin interference with that jurisdiction.*

The controversy between the trustee and All Continent as to the identity between All Continent and the bankrupt

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of scheduled cash assets. But when the trustee and referee there had disappointed him by pressing too hotly on the trail of All Continent, his wife stopped the proceedings by going into contempt, and caused the corporation of which she was president to attempt to shift the venue to Pennsylvania.

was presented to the bankruptcy court by (a) the filing of a proof of claim by All Continent, and (b) the conduct of examinations under § 21(a), which resulted in a referee's order directing production of All Continent's books for audit along with those of the bankrupt, and a referee's report which strongly indicated the validity of the trustee's contention that All Continent is simply the *alter ego* of the bankrupt. This is the identical controversy presented by the subsequent Pennsylvania suit, for the purpose of that suit is to set aside the injunction obtained by the creditor Capital Company in New York, which injunction covered only the "property of William Fox" and, in determining whether that injunction constituted a "cloud" on the title of the Philadelphia securities, the question would be whether they were the "property of William Fox" or the property of All Continent.

If the combination of these admitted facts cannot suffice to confer upon a bankruptcy court the power within its discretion to issue an injunction of the present character, then it must be because a bankruptcy court can never issue an injunction other than in protection of a specific property *res* in its possession. If a bankruptcy court can ever issue an injunction to protect its orderly administration of bankruptcy proceedings, then it is impossible to conceive a case in which the injunction would be more justified.

We know of no case in this Court directly in point, but we submit that on principle the doctrines (a) of *Myers* v. *International Trust Co.*, 263 U. S. 64 (a decision that a bankruptcy determination of fact is conclusive elsewhere as to the same issue of fact), (b) of the numerous cases that recognize and enforce the statutory provisions that courts of bankruptcy are vested with equitable jurisdiction, for example, *Local Loan Co.* v. *Hunt*, 292 U. S. 234 and *Whitney*

v. *Wenman*, 198 U. S. 539, (c) of *Bronx Brass Foundry, Inc.*, v. *Irving Trust Co.*, 297 U. S. 230 (that a bankruptcy court has power to refuse to permit the withdrawal of a claim to the same extent as an equity court may protect jurisdiction it has acquired over a controversy), (d) of *Alexander* v. *Hillman*, 296 U. S. 222 (that filing of a proof of claim in an equity receivership constitutes a submission to the court for the purpose even of a counterclaim assertable by the receiver against a creditor), (e) of numerous decisions that recognize and enforce the broad remedial functions of § 21(a), and finally (f) of *Continental Illinois Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (that sale of collateral by an obligee may be enjoined, at least in proceedings under § 77 of the Bankruptcy Act, pending disposition of issues relating thereto in the bankruptcy court), compel the conclusion that jurisdiction once acquired over a controversy may be protected by the bankruptcy court through the use of its injunctive power.

There can be no doubt that All Continent conferred upon the bankruptcy court jurisdiction of the controversy as to identity between itself and the bankrupt. It did this by the very filing of its claim. The first and most obvious defense to such claim is and must be that All Continent cannot file any claim, for it is but the *alter ego* of the bankrupt himself. Unlike the situation in *Whitney* v. *Wenman*, 198 U. S. 539, it was unnecessary for the trustee to take affirmative action to raise that issue, even in the bankruptcy court. The affirmative step was already taken by All Continent in the very act of filing the claim. *Edward Finch Co.* v. *Robie*, 12 F. (2d) 360 (C. C. A. 8th, 1926); 4 *Remington on Bankruptcy* (4th ed., 1935) § 1538. The trustee had but to contest it as soon as it came on for hearing. And of

that contest the bankruptcy court has undoubted jurisdiction. To say that, merely because the contest has not yet been had, the bankruptcy court was powerless to prevent the taking of that contest out to another jurisdiction chosen by All Continent for the purpose, is to make a mockery of the power of the bankruptcy court.

It is well settled that determination of the issue of identity by the bankruptcy court will be binding, in so far as the same issue is presented in future litigation, upon all parties to the issue, including the claimant, All Continent; the creditors, including Capital Company; and the trustee—all the parties to the Pennsylvania suit except Sparks & Co., which is a mere custodian of the securities involved in the Pennsylvania suit. *Myers* v. *International Trust Co.*, 263 U. S. 64.

In the *Myers* case a creditor had objected to approval of a composition of the bankrupt on the ground that he had obtained credit upon the basis of a materially false statement. The bankruptcy court having found adversely to the objecting creditor, and having approved the composition, its determination was held conclusive against the creditor in a subsequent suit at law instituted by the creditor against the bankrupt for damages caused by the same alleged deceit. This Court reversed a decision of the Massachusetts Supreme Judicial Court in favor of the creditor because of an error of the trial court in excluding from evidence the record of the bankruptcy judgment on the composition.

Even if the adverse claim of All Continent be not merely colorable, and be of sufficient substance to require a plenary suit to compel the turning over of the property to the trustee, nevertheless the prior adjudication of the primary question, viz. the identity of William Fox and All Continent, made

by the bankruptcy court in passing upon the objections to the claim of All Continent, will be held binding and conclusive in such plenary suit. Cf. *Head* v. *Brainard*, 5 F. (2d) 289 (C. C. A. 9th, 1925), in which a plenary suit was held necessary to determine the *value* of the converted property of the bankrupt, although the adjudication before a special master in ancillary bankruptcy proceedings of the main question of title and conversion of the property was held binding.

In *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230, a claim was filed in a bankruptcy proceeding, to which objection was made by the trustee on the ground that the creditor had received a preference. After some hearings had been held on this issue, but before any determination thereon by the bankruptcy court, the creditor sought to withdraw his claim. The bankruptcy court applied an equity rule which gave the court power to refuse to permit a plaintiff to discontinue after issue had been joined, even though no particular hardship would result to the defendant from such a discontinuance, and denied leave to withdraw the claim.[11] That result was affirmed by this Court.

Admittedly in the present case there has been neither a discontinuance by the claimant nor effort to discontinue, on the one hand, nor hearings contesting the claim, on the other hand. The question is presented whether those facts require the Court to distinguish the rules in the *Myers* and *Bronx Brass* cases. Our view is that the distinctions are

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[11]**The rule in the New Jersey Bankruptcy Court is even more explicit. Bankruptcy Rule 21 E provides:**

> **"Proofs of claim may be withdrawn at any time upon written notice to the referee *and his approval.* * * *" [Italics ours.]**

unsubstantial. The spirit of the rule of those cases, which must be applied alike to the present case, is that a claimant will not lightly be permitted to defeat the jurisdiction or disregard the determinations of the bankruptcy court, whose jurisdiction he has himself invoked. We refer, of course, to jurisdiction over such controversies as are necessarily inherent in the presentation of the claim,—such as the controversy here as to whether the claimant itself is more than the shell of a corporate entity, or has in reality any corporate assets as against the bankrupt.

Subsequent to the decision of this Court in the *Bronx Brass* case, the question was submitted to the Circuit Court of Appeals for the Second Circuit whether the fact that hearings had not yet been had upon the objections to the claim provided a distinction from the *Bronx Brass* case, so that the claimant would then have an absolute right to withdraw his claim. A majority of the Court held that the distinction was not one of substance. *In re Steinreich Associates, Inc.*, 83 F. (2d) 740 (C. C. A. 2d, 1936).

However, an effort might be made to distinguish that case itself on the ground that the trustee had there interposed formal objections to the claim. To this there are two answers:

First, on the facts of this case, it must be apparent (even if we do not take notice of the fact in the *Matter of Steelman* record that a creditor had already objected, and of the fact in the Supplemental Record that the trustee thereafter instituted a plenary proceeding in respect of the same issues) that on the face of the referee's order and report the trustee will surely object to the claim, and indeed, would be guilty of a breach of duty if he failed to do so. This was an obvious factor of which the bankruptcy court

could take note when issuing its injunction. Certainly it would have been scrupling over a technicality to distinguish the *Steinreich* case on the ground that the trustee had there filed his formal objections and to refuse an injunction in the present case because the trustee had not yet filed his formal objection.

Second, the *ratio decidendi* of the *Steinreich* case (following the *Bronx Brass* case) is broad enough to ignore such subtle distinctions. The ground of the decision was that where an adverse party has submitted himself to the bankruptcy jurisdiction, and has thereby necessarily submitted his controversy with the trustee, and where the bankruptcy court is diligently pursuing its investigation of the matter (as here by § 21(a) examinations), then the bankruptcy court has the power to protect its jurisdiction. If those decisions are rested on narrower grounds, they have introduced into the law of the subject a necessity of splitting hairs over the precise facts in each case and have not brought the law into harmony with the broad principles considered by this Court to be so desirable and appropriate to bankruptcy jurisdiction, as pointed out in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, and in *Continental Illinois Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648.[12]

Alexander v. *Hillman*, 296 U. S. 222 bears strongly upon this question. This Court there laid down a rule for equity receivership cases which, if applicable to bankruptcy proceedings, would even render a plenary suit by the trustee against All Continent wholly unnecessary. Under that rule, the mere filing of the claim would vest the bankruptcy

[12]Discussed *supra*, pp. 18-20.

court with jurisdiction of all issues between the claimant and the trustee.[13] We may agree that the provisions of § 68 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541 § 68, 30 Stat. 544, 565, 11 U. S. C. § 108) do not permit the rule to be pressed so far, and that in this respect the bankruptcy court (at least in proceedings other than those under §§ 77 and 77B) lacks some of the powers of a court of equity. Yet it remains true that the decisions indicative of a modern remedial trend in favor of a "freedom as to procedure", must liberally recognize power in courts entrusted with the administration of insolvent estates, at least where the admitted allegations 'make it appear that corporate respondents were so under control of individual respondents [or a bankrupt] as to be merely their [his] tools for carrying out the transactions culminating in the misappropriations alleged' (paraphrased from *Alexander* v. *Hillman*, 296 U. S. at p. 240).

We turn finally to the recent case of *Continental Illinois Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648. This case is not referred to in the opinion of the Circuit Court of Appeals; but it appears to be determinative. Much of the language of this Court in that case[14] failed of its purpose, if the decision here is to stand. We will not again review that language in detail. Suffice it to say that, if the controversy in this case had not been submitted to the bankruptcy court through the filing of the claim therein by the adverse party and by the course of the

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[13]As held by the Circuit Court of Appeals for the 2nd Circuit in *In re Trayna & Cohen*, 195 Fed. 486, 487:

> "There is no hardship in holding the petitioner to the jurisdiction first invoked by him."

[14]See *supra*, pp. 18-20 for detailed discussion.

§ 21(a) examinations, then much of the liberal and constructive language of this Court's opinion in the *Continental Bank* case was too broad, if not definitely misleading.

What ultimate and practical value was it to creditors for this Court to approve "the fundamental and radically progressive nature" of the "extensions" of the bankruptcy power, "all * * * judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution" (294 U. S. at p. 671), which "have constituted extensions into a field whose boundaries may not yet be fully revealed" (*idem*), and representing as they do steps "in the direction of liberalizing the law on the subject of bankruptcies" (*idem*), if the bankruptcy court still lacks the power here asserted? Would it not be strange if the general language of § 2, which broadly invests the bankruptcy courts "with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings", were properly construed to embrace injunctions against sale of collateral (294 U. S. at p. 675), and yet not to suffice for injunctions against suits having an even more radical effect,—the effect of securing to others property, not (as in those cases) in respect of which the adverse claimant has admittedly a lien, mortgage or other superior interest, but in respect of which examination under § 21(a) has disclosed that the adverse claimant very likely has no interest at all? Can it then any longer be said of such powerless courts that "their adjudications and orders constitute in all particulars decrees in equity" (294 U. S. at p. 675)? Should it not rather be held that the principle is decisive that "the power to issue an injunction when necessary to prevent

the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity" (294 U. S. at p. 675)?

3. To avoid a multiplicity of suits and to restrain the bankrupt's attempts, through his alter ego, All Continent, to frustrate an orderly determination in the bankruptcy court of the issues on which that court's decision will be conclusive, an injunction was necessary.

The bankruptcy court had before it the fact that the trustee and creditors had been diligently conducting § 21(a) examinations of various witnesses, including the officers and employees of All Continent (R. 3, 10). It further knew that Eva Fox, president of All Continent and the wife of the bankrupt, had refused to testify and had been cited for contempt (R. 6, 13). It had before it the referee's report indicating that, in so far as the trustee had been able to ascertain, in spite of All Continent's obstructive tactics, there was a strong probability that All Continent was merely a sham created by the bankrupt for the purpose of defeating the rights of his creditors (R. 4-5, 11-12).

The conduct of § 21(a) examinations is a vital part of the orderly administration of any bankrupt estate. The function of such examinations is frustrated unless the trustee's examination be thorough and searching and this, of course, takes time. The trustee starts in ignorance and must learn. If an adverse claimant under examination were free to nullify the effect of the procedure set up by the Bankruptcy Act for education of the trustee as to the facts, by commencing proceedings in another jurisdiction by which the question under examination could be finally

disposed of and the trustee be bound, the purpose and effectiveness of such examinations would be gravely imperilled, if not defeated entirely. Yet that is the theory of the Circuit Court of Appeals in the present case, holding as it does that it is the duty of the trustee to come into the Pennsylvania Court proceedings and there to litigate the entire question under examination in § 21(a), and that the trustee will be bound in all jurisdictions by the decision in Pennsylvania. A notable statement of the principle was that first made by Chief Judge Shaw for the Supreme Judicial Court of Massachussetts in *Harlow* v. *Tufts*, 4 Cush. 448, 453 (1849) and adopted by District Judge Lowell[15] in *In re Krueger*, Fed. Cas. No. 7942 (D. C. Mass. 1872) whence it found its way into *In re Fixen*, 96 Fed. 748, 755 (D. C. S. D. Cal., 1899) and was from there taken up and repeated by the Circuit Court of Appeals for the Second Circuit last year in *In re Paramount Publix Corp.*, 82 F. (2d) 230, 233:

> "The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim."

And it was said by this Court in *Cameron* v. *United States*, 231 U. S. 710, 717, that:

> "In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act

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[15] Judge Lowell was a recognized authority on bankruptcy law, and was the draftsman of the Bankruptcy Act introduced in Congress in 1883. See *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 334.

> must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved."

A decision that the bankruptcy court may protect this power of examination under § 21(a) by enjoining premature contest by adverse parties of the same questions in other courts should rest on obvious principle. However, the practical advisability of the principle is strikingly illustrated by the present case, in which the contrary doctrine has been applied by the Circuit Court of Appeals in favor of a corporation whose officers have actually refused to testify and to produce books and records under § 21(a), and against whom contempt proceedings are actually pending. Yet, says the Circuit Court of Appeals, these are the parties who can foreclose the trustee by instituting a proceeding elsewhere which will be finally determinative of all the issues, and it is the *duty* of the trustee to follow them where they choose and there to sustain the burden of defense, although the liquid assets of the estate do not permit such defense to be adequately conducted.

B. The propriety of the bankruptcy court's exercise of its injunctive power receives additional support from the supplemental record, which was admitted by the Circuit Court of Appeals on motion of All Continent.

The fact that shortly after the granting of the injunction order, and pursuant to authorization of the bankruptcy court, the trustee instituted a comprehensive plenary

suit against All Continent in the New Jersey Chancery Court appears from the "supplemental record" which was admitted by the Circuit Court of Appeals on motion of All Continent[16] (R. 35-36). This record further discloses that the plenary suit is a comprehensive action in equity to recover, among other things, all of the assets of All Continent, and to have decreed the trustee's beneficial ownership of the stock of All Continent (R. 36-88), all of which stock, it will be recalled, is registered on its books in the name of the bankrupt (R. 4, 11, 39, 69).

Respondent may argue that the plenary suit may not be considered here. We think the argument unsound.

First, All Continent is not in a position to object to the inclusion in the record of the bill of complaint in the plenary suit, which was placed there upon its own motion before the Circuit Court of Appeals. In effect, the Circuit Court of Appeals (before passing upon the injunction of the bankruptcy court) wished to be fully informed as to the facts, or at least was willing to be so informed on motion of All Continent. We take it that this Court in reviewing the action of the Circuit Court of Appeals will certainly not limit its horizon to one less broad then the one before that court whose action it is reviewing.

Second, the fact that the plenary suit was commenced after the entry of the injunction order should not be a ground of objection, as this would be simply another way of arguing that subsequently occurring facts should not be in the record where the propriety of the bankruptcy court's

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[16]This suit has since been removed to the United States District Court for New Jersey. The rather unusual circumstances under which this removal was effected are explained at pp. 53-55, *infra.*

order is the subject of review. Were it true, however, that the institution of the plenary suit is an element necessary to sustain the injunction of the bankruptcy court,—that is to say, if the other evidence before the bankruptcy court were insufficient to sustain it, but this additional item would be sufficient to sustain it,—then the Circuit Court of Appeals was in a position to sustain it in view of its admission of this item to the record.

1. *The institution of the plenary suit was a further step in the exercise of jurisdiction over the controversy by the bankruptcy court, which it properly protected by the injunction order.*

The trustee's plenary suit raises every issue between All Continent and the trustee. If the trustee is successful, all of All Continent's property will become part of the estate. Whatever may have been the effect of the filing of a claim, and of the contentions made by the trustee as a result of the § 21(a) examinations, the bringing of this suit with the consent of the bankruptcy court clearly amounted to a joinder of issue on the vital questions as to the validity of All Continent's adverse claim.

2. *The trustee in bankruptcy is admittedly the record owner and claims to be the beneficial owner of the stock of All Continent Corporation. The issue as to beneficial title to the stock is and can be presented only in the suit instituted by the trustee in New Jersey. If the trustee succeeds on that issue, the Pennsylvania suit will become moot. The prosecution of the Pennsylvania suit before determination of that issue therefore constitutes a waste of the assets of the bankrupt estate.*

The evidence in the § 21(a) examinations is undisputed that the certificate representing all of the stock of All Continent Corporation was originally issued to the bankrupt William Fox and still stands in his name (R. 4-11, 37, 39, 69). The record title to this stock accordingly became vested in the trustee in bankruptcy by operation of law.

The dispute respecting title to the stock, as distinguished from the assets, of All Continent, therefore, relates only to the beneficial title which is claimed by both the trustee and the bankrupt's wife (R. 38, 53, 55-61, 69). If the trustee succeeds in establishing himself as the owner of all the stock of All Continent, the issue heretofore discussed,—the issue as to whether All Continent is the *alter ego* of the bankrupt—is of no consequence.

The trustee has taken steps by his bill of complaint filed in New Jersey Chancery (R. 36-88) to establish his claim of beneficial title to this stock. This issue being between the trustee, a resident of New Jersey, and the bankrupt's wife (also a resident of New Jersey) respecting the title to the stock certificates in a Delaware corporation, which certificates are physically located in New Jersey (R. 3, 10[17]), obviously cannot be presented in any suit commenced in Pennsylvania. No attempt has been made to litigate this issue in the Pennsylvania suit now pending. Yet if the trustee should prevail on this issue, it is obvious that litigation of the issue

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[17]While the physical location of the certificates does not appear from the printed record in this Court, it appeared from the record of the § 21(a) examinations (Vol. 3, pp. 97-99) that they were physically offered in evidence at Atlantic City. This § 21(a) record was considered by the bankruptcy court in granting the injunction herein but was omitted by All Continent from its printed record on appeal.

of identity between the bankrupt and All Continent would be unnecessary either in the Pennsylvania suit or in the bankruptcy court, for that would be an issue between the trustee as trustee and the trustee as owner of All Continent.

The defense of the Pennsylvania suit, necessarily at substantial expense to the trustee,[18] before determination of the issue as to ownership of the stock of All Continent, therefore constitutes a waste of assets of the bankrupt estate in the trial of what may be, and very likely is, a moot question.

C. The propriety of the bankruptcy court's exercise of its injunctive power receives additional support from the facts in the *Matter of Steelman* record.

The additional facts appearing from the *Matter of Steelman* record are as follows:

(a) The date of filing of the claim of All Continent was June 19, 1936, and the amount for which it was filed was $417,258.19 (*Matter of Steelman*, R. 20).

(b) The counsel for one of the creditors, Capital Company[19] objected to All Continent's claim immediately after it was filed, on the grounds quoted at pages 20-21 of the *Matter of Steelman* record.[20]

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[18]Which he cannot in any event (with his $100) afford, unless the creditors finance him.

[19]Capital Company was the respondent before this Court in *Fox* v. *Capital Company*, 299 U. S. 105. It was naturally ahead of the trustee in its knowledge as to the relations between the bankrupt and All Continent, as it acquired that knowledge in the course of the New York proceedings (prior to the bankruptcy), which were the subject matter of the above-mentioned case in this Court.

[20]Its objection appears at page 15 of the stenographer's minutes of the meeting of creditors June 19, 1936, which were before the district court when it granted the injunction herein, but were not incorporated by respondent in its record on appeal to the Circuit Court of Appeals.

(c) All Continent, the bankrupt, the members of his family, and his employees were engaged in a comprehensive conspiracy, of which the Pennsylvania suit was a part, to impede, delay, and prevent the payment of the bankrupt's creditors both before and after the bankruptcy. Among the other facts establishing such a conspiracy are the following:

(1) The bankrupt transferred to All Continent in 1930 assets worth at least $6,950,000 and then proceeded to dominate and control its affairs, dealing with its assets as if they were his own personal assets (*Matter of Steelman,* R. 5; R. 4, 11, 37, 39-47, 67-83).

(2) After a judgment had been obtained against the bankrupt in the United States District Court for the Southern District of New York by Capital Company, he refused to appear and be examined concerning his assets pursuant to a subpoena in supplementary proceedings, for which he was subsequently adjudged in contempt by that court (*Matter of Steelman,* R. 9-10; *Fox* v. *Capital Company,* 299 U. S. 105).

(3) After his adjudication in bankruptcy, the bankrupt unsuccessfully sought to enjoin the examination of third parties as to his assets in New York by Capital Company (in its supplementary proceedings), although Capital Company's counsel had stated in open court that any information so obtained would be made available to the trustee without expense (*Matter of Steelman,* R. 13-16, 154-165).

(4) During the course of § 21 (a) examinations, Herbert Leitstein, an officer of All Continent and the bankrupt's personal secretary (as well as Eva Fox, the bankrupt's wife, and president of All Continent), wilfully refused to testify concerning the affairs of the bankrupt and All Continent, for which he was also cited for contempt by the referee (*Matter of Steelman,* R. 16).

(5) All Continent refused to make its books available for audit pursuant to the order of the referee already mentioned (which was affirmed by the bankruptcy court with modifications affecting only the manner of conducting the examination, 16 F. Supp. 950) and took an appeal to the Circuit Court of Appeals, Third Circuit, which was argued and is still undetermined (*Matter of Steelman,* R. 17).

(6) After the decision of the Circuit Court of Appeals under review here, All Continent applied for and obtained, by an ancillary bill of complaint in the Pennsylvania action (*Matter of Steelman,* R. 182-193), a complete and comprehensive injunction against "the prosecution of the suit commenced by" the trustee in the New Jersey Chancery Court, pending the determination of the issues in the Pennsylvania suit. (*Matter of Steelman,* R. 25-28). The order enjoined all action by the trustee in that suit, without even being limited to such part of the suit as affects All Continent. (*Matter of Steelman,* R. 117-118).

The power of this Court to take notice of the facts contained in the record in *Matter of Steelman,* which is now pending before this Court, has been discussed *supra* at page 2 (footnote 1). All Continent had an opportunity to raise any issue of fact as to the allegations of the petition for prohibition or mandamus when it filed its objections to the granting of a temporary restraining order in that proceeding, but it failed to do so. The facts alleged in that petition are true and undisputed, and are taken for the most part from the unquestioned records in court proceedings. We assume that this Court will consider them, both on authority, and because on principle this Court should have all the facts before it as to what actually transpired in the courts below.

1. *The record in Matter of Steelman discloses that the Pennsylvania suit was simply one step in a comprehensive conspiracy by All Continent, the bankrupt, the members of his family and his employees to impede, delay and prevent the payment of the bankrupt's creditors both before and after the bankruptcy. As such it was properly enjoined.*

The facts, other than the institution of the Pennsylvania suit by All Continent, which demonstrate the existence of a comprehensive conspiracy between All Continent, the bankrupt, the members of his family and his employees to impede, delay and prevent the payment of the bankrupt's creditors, both before and after the bankruptcy, have been stated *supra* at pages 46 to 47. The bankruptcy court's power to enjoin the particular phase of such conspiracy involved in the Pennsylvania suit and the propriety of its exercise of that power under the facts of this case need no further elaboration.

2. The fact that objection to All Continent's claim as a creditor of the bankrupt had already been made by another creditor, Capital Company; is an additional basis for the argument that the bankruptcy court, before the institution of the Pennsylvania suit, had acquired jurisdiction of the controversy between All Continent and the trustee as to the identity of All Continent and the bankrupt.

The fact that objection was actually made by counsel for Capital Company to All Continent's claim (quoted in *Matter of Steelman*, R. 20-21) on the day it was filed (*Matter of Steelman*, R. 20), considered together with the facts appearing in the trustee's petition (particularly the events in the § 21(a) examination) would seem to bring this case directly within the principle of *Bronx Brass Foundry, Inc.*, v. *Irving Trust Co.*, 297 U. S. 230 and *In re Steinreich Associates, Inc.*, 83 F. (2d) 740 (discussed at pages 34 to 36). After the very issue of All Continent's identity with the bankrupt had been raised in the bankruptcy proceedings, All Continent attempted to remove that controversy from the bankruptcy court (not by withdrawing its claim as in the above cases, but by commencing a race of diligence to have that issue first determined by the Pennsylvania court).

D. It may well be that the filing of a claim by All Continent, in the circumstances of this case, conferred on the bankruptcy court exclusive jurisdiction over this controversy.

In summary, we submit that the power of the bankruptcy court to issue this injunction cannot seriously be disputed. Indeed, it may well be (although a decision to that effect is not necessary to a decision of this case in our favor) that the true rule must be that in the circumstances here presented (filing of the claim by the adverse

party, conduct of the § 21(a) examinations, and the referee's order and report relating to the identity of All Continent with the bankrupt) the bankruptcy court has not only acquired jurisdiction to issue an injunction, but has acquired *exclusive* jurisdiction over the controversy as to ownership of the All Continent assets, such jurisdiction being prior and therefore paramount to that of the Pennsylvania District Court or any other court.

The establishment of that principle, although in a strict sense unnecessary to the decision of this case, is appropriate and called for in this case. The reason is that, by numerous and unnecessary *dicta,* the Circuit Court of Appeals has laid down precisely the opposite principle, saying not merely that the bankruptcy court lacked the power to issue this injunction, but further that the Pennsylvania court should have "exclusive" jurisdiction of the controversy as to ownership of the assets. Such *dicta* must have a profound effect on all of the lower courts in the third circuit, in which all further proceedings in respect of this bankruptcy must occur (whether in the bankruptcy court itself, or in the United States District Court of New Jersey in which the trustee's plenary suit is now pending, or in the United States District Court for the Eastern District of Pennsylvania). These *dicta* amount in effect to instructions for those courts, and unless this Court replaces them by sound instructions, the prejudicial effect of the opinion below to the trustee and to creditors of this estate will not have been effectively removed.

Specifically, the *instruction* which would appear appropriate (as supplemental to the *decision* that the bankruptcy court had power to issue the injunction appealed from) is an instruction that the Circuit Court of Appeals was in error in holding that the Pennsylvania court had

exclusive jurisdiction of the controversy between the trustee and All Continent as to the ownership of the assets claimed by All Continent, and that, on the contrary, the filing of a proof of claim in the bankruptcy proceedings by All Continent, and the development by the § 21(a) examination of evidence strongly indicative that the assets of the bankrupt never truly passed to All Continent, combine to give exclusive jurisdiction over that controversy to the bankruptcy court, subject at most to the bankruptcy court proceeding with due order and expedition to resolve that controversy, *first* by completing the § 21(a) examinations (once the officers of the respondent have ceased to be in contempt and have tendered their evidence and their books), and *second,* by trying the issue out on the defense of the claim itself, or in the plenary suit already instituted by the trustee under the supervision of the bankruptcy court.

POINT III

THE *DICTA* OF THE CIRCUIT COURT OF APPEALS (NOTABLY THE *DICTUM* THAT THE PENNSYLVANIA COURT HAS EXCLUSIVE JURISDICTION OF THE CONTROVERSY BETWEEN THE TRUSTEE AND THE RESPONDENT CORPORATION) SHOULD THEMSELVES RECEIVE THE ATTENTION OF THIS COURT, AS THEY ARE DEFINITELY PREJUDICIAL TO THE TRUSTEE, AND IN ANY EVENT THEIR INCLUSION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS REPRESENTS AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The dicta in question are:

(1) A cloud is created on the title of All Continent to certain securities, as a result of the issuance by the United

States District Court for the Southern District of New York, at the suit of a creditor, of a subpoena containing an injunction authorized by § 781 of the Civil Practice Act of New York to the effect that a "third person * * * is hereby forbidden to transfer * * * property belonging to the judgment debtor * * * until the further order of the court" (R. 102, 104).

> The most that can be said of this injunction is that it suggests the possibility that some property (not identified) in the name of All Continent may belong to Fox. Whether the mere issuance of a subpoena to testify and to produce books and records constitutes in itself a cloud on *title* to the securities in respect of the ownership of which such evidence is sought, is at the very best a question open to substantial doubt, and on which the Circuit Court of Appeals should not thus have foreclosed itself in advance.

(2) The Pennsylvania court is the "only court that can" remove "the cloud upon the title to the securities" (R. 104).

> Obviously, the United States District Court for the Southern District of New York could have removed the "cloud", if such it be, which it had itself created; and the Pennsylvania court was not the only court that could do so.

(3) The controversy in the plenary action filed by the trustee in the New Jersey Chancery Court is, so far as All Continent is concerned, "substantially the same controversy that is involved in the Pennsylvania Court" (R. 105).

But the Pennsylvania action involves only certain specific assets claimed to be owned by All Continent, and the effect thereon of the third party subpoena issued by the New York court; whereas the action in the Court of Chancery of New Jersey involves all of the assets of All Continent. The distinction is a substantial one. The referee has reported that the bankrupt himself "retained in his possession and under his control, the securities forming the assets of the Corporation" (R. 4, 11); but it may develop that this was true as to some of the assets and not true as to others. That differentiation, if it exists, can be recognized in the New Jersey action, in which all of the assets are involved, but cannot be recognized in the Pennsylvania action, which concerns only the assets specifically situated in Pennsylvania. Indeed, a later clause of the referee's report itself recognizes the possibility of differentiation between different assets, for it says that "*in numerous instances,* the bankrupt dealt with the assets of corporation as his own." There may have been other instances in which he did not do so.

Furthermore, the Pennsylvania suit does not necessarily involve the issue of fraud raised by the trustee against All Continent in the New Jersey plenary suit. All Continent might in the Pennsylvania suit establish title (free of the so-called cloud), but would not thereby establish that the title was not originally obtained through a fraudulent conveyance to the bankrupt.

(4) "This bill in the Court of Chancery, while having no bearing upon the conclusion reached in this opinion,

really sets forth two separable controversies. By the one between the trustee and the appellant [All Continent], the trustee seeks to obtain all the property claimed by the appellant and in this the appellant is the only necessary party defendant; by the other, he seeks to set aside a certain trust agreement and in this the other defendants are the only necessary parties defendant" (R. 105).

The Circuit Court of Appeals itself labeled this as a *dictum*, stating that it "had no bearing upon the conclusion reached in this opinion." However, the *dictum* was of material importance, as in effect it instructed the courts below that the plenary action in the Court of Chancery of New Jersey was removable to the Federal Court. At the time that the opinion of the Circuit Court of Appeals was filed (December 1) the defendants in the New Jersey action had not sought to remove it. But immediately upon the filing of the opinion of the Circuit Court of Appeals, they made a motion in the State Court of New Jersey to remove the action.

This was far more serious than merely prejudging a question which otherwise would ultimately have come before the Circuit Court of Appeals in its appellate capacity. It was an usurpation by the Circuit Court of Appeals, in that there is no procedure for review in that court of a decision of a district court remanding an action on jurisdictional grounds as not removable.[21]

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[21]28 U. S. C. § 71 (Judicial Code Sec. 28, Act of Mar. 3, 1887, c. 373, 24 Stat. 552, corrected and re-enacted by Act of Aug. 13, 1888, c. 866, 25 Stat. 433); *Employers Reinsurance Corporation* v. *Bryant*, 57 Sup. Ct. Rep. 273, 275-276 (not yet

> Yet this expression of opinion by the Circuit Court of Appeals could not fail to have great influence over a lower court which, although a contrary decision by it could not be reviewed in this particular case, is subject in almost all other cases to a review of its decisions by the appellate court that uttered the *dictum*.

(5) "In order for the trustee to establish his ownership of all of the property of the appellant [All Continent] including the securities in the possession of Sparks & Co., on the ground that it in fact belonged to Fox, it is necessary for him to prove all of his averments in his bill in the Court of Chancery which relate to the appellant. The same proof will have to be made in the Pennsylvania Court as to the securities here in question" (R. 105).

> It is not necessary for him to prove *all* of his averments. He may recover against All Continent in the Court of Chancery of New Jersey on either of several grounds; for example, he may establish as to all or part of the alleged properties of All Continent (1) that they never really passed to All Continent at all and have continued in the possession and under the control of the bankrupt, or he may establish (2) that they passed to All Continent but have been directly controlled and administered by Fox while merely using the name of All

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officially reported); *Chicago, Burlington and Quincy Railway Company* v. *Gray*, 131 U. S. 396; *Morey* v. *Lockhart*, 123 U. S. 56. See also: *Pacific Live Stock Company* v. *Oregon Water Board*, 241 U. S. 440, 447; *Powers* v. *Chesapeake and Ohio Railway Company*, 169 U. S. 92, 97-98; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.

Continent, or finally (3) that they have been directly administered by All Continent but as the mere agent, dummy or instrumentality of Fox and always subject to his direct and immediate dictation. Under any one of these three views, the particular asset or assets in question, or perhaps all of them, might become the property of the estate and not of All Continent; but proof of any one of the three propositions would be sufficient, and it would not be necessary therefore to prove all of them.

Furthermore, if the trustee succeeds in establishing his contention in the New Jersey Chancery suit that he owns the *stock* of All Continent, it will be unnecessary for him to prove anything respecting ownership of the assets. He will own the owner.

(6) From the previous *dictum*, the Circuit Court of Appeals next drew a further erroneous conclusion:

"Under these circumstances, a decree made in favor of appellee [the trustee] in the Pennsylvania suit could only be based upon a finding by that Court that all of the assets of the appellant belong to the appellee." (R. 105)

We have already pointed out the fallacy of the view that the trustee must prevail in respect of all of the assets before he can prevail as to any of them. The reverse is true—that he can prevail as to some of them without prevailing as to the others.

(7) The next sentence reads:

"Such a finding would be binding and conclusive upon appellant [All Continent] not only in the Pennsylvania

court, but in every other court in which that question might be litigated between the parties." (R. 105)

> Here we have a *dictum*, unique in that it is favorable to the trustee and adverse to All Continent. But we will have to forego its benefits, as again it appears to be erroneous. As the Pennsylvania action involves only particular assets, and as it may be determined upon the basis of findings of fact relating only to the administration of those particular assets, it could not, if adverse to All Continent, preclude that corporation from presenting other grounds to contest efforts by the trustee in other jurisdictions to recover other assets. Another court could disregard a finding by the Pennsylvania court that *all* of the assets of All Continent truly belonged to the trustee, and could properly hold that that finding was too broad, as it was neither true that all of the assets of All Continent were involved in the Pennsylvania action nor that the decision in regard to the particular assets in the Pennsylvania action necessarily determined all of the questions and controversies that might arise in regard to other assets elsewhere.

(8) The Circuit Court of Appeals proceeds (R. 105):

"Under these circumstances, the Pennsylvania Court having first acquired jurisdiction of the property and controversy is entitled to exclusive jurisdiction and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired."

Here is a double-barreled error, in that (1) the "property" of which the Pennsylvania Court had jurisdiction was not all of the property, title to which is involved in the plenary action in New Jersey, and (2) that there may be other controversies between the trustee and All Continent arising in the plenary action in New Jersey which are not presented in Pennsylvania.

In any event, it is plainly erroneous to hold that the Pennsylvania Court has "exclusive" jurisdiction of all controversies between the trustee and All Continent involving the property of the latter. Yet that the use of the word "exclusive" was not unintentional is proven by the next sentence of the opinion of the Circuit Court of Appeals:

(9) "The appellant [All Continent] is entitled to maintain the exclusive jurisdiction which it thus acquired under the authority of section 57 of the Judicial Code and may, upon proper application, restrain the trustee from litigating the controversy elsewhere". (R. 105)

Here is the logical and fatal culmination of the chain of erroneous *dicta*. Says the Court: By its bold stroke in Pennsylvania, the corporation against which the trustee was patiently and in an orderly manner accumulating evidence in § 21(a) proceedings has "acquired" exclusive jurisdiction for the Court of its choice to oust the trustee from further action,—indeed, may actually "restrain the trustee from litigating the controversy elsewhere".

As appears in *Matter of Steelman*, R. 117-118, 194-195, all Continent did in fact, forthwith and on

the same day of the filing of his opinion in the Circuit Court of Appeals, obtain from District Judge Welsh of the Eastern District of Pennsylvania an injunction against further litigation of the controversy by the trustee in his plenary suit in New Jersey.

The trustee is thereby dragged into a controversy in a foreign court "wherein the estate might lose much" but could gain little or nothing (*Fulton Bank* v. *Hozier*, 267 U. S. 276, 280). Indeed, the language of this dictum would indicate that, in the opinion of the Circuit Court of Appeals, petitioner cannot even oppose respondent's claim on this ground in the bankruptcy proceedings.

Moreover, if the mere filing by All Continent of its bill in Pennsylvania did (as the Circuit Court of Appeals says) confer such jurisdiction over the controversy on the Pennsylvania court as would prevent other courts from considering the same controversy, then on the same argument the Pennsylvania court was itself precluded by the prior presentation of the same controversy in the New Jersey bankruptcy court as a result of the filing there of a proof of claim by All Continent, and the development there in orderly § 21(a) proceedings of a defense thereto by the trustee. This is the position that we have taken in Point II, *supra*, pages 49 to 51.

(10) "The Capital Company has been *and is* seeking to get these securities, not for the creditors as a whole but for itself" (Italics ours) (R. 106).

Prior to the bankruptcy, the Capital Company was, of course, in obtaining the third party subpoena in New York, seeking to get the securities for itself. See *Fox* v. *Capital Company*, 299 U. S. 105. But after the bankruptcy, the Capital Company was precluded from getting the securities for itself, except through proceedings in the bankruptcy court.

True, the position of the Capital Company was that the securities actually belonged to the bankrupt, and not to All Continent. But after the bankrupt had filed his voluntary petition, constituting a *caveat* and an injunction against the world (*Mueller* v. *Nugent*, 184 U. S. 1, 14; *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S. 300, 306), the Capital Company could no longer assert any superior rights to any particular assets of the bankrupt elsewhere than in the bankruptcy court, except, of course, with prior leave of the bankruptcy court.

True it is that presumably the Capital Company will assert in the bankruptcy court such claim as it might have to preferential treatment as a result of its activities in the New York courts prior to the bankruptcy.[22] Of that claim, the Circuit Court of Appeals rightly says that it will be "adverse to the interests of the trustee who represents all the creditors generally". But the *forum* for determination

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[22]**Indeed, the Capital Company has asserted its position in the bankruptcy court, although there is no reference thereto directly in the record, for, of course, the point was not properly involved in this case, and came in only as a result of the *dictum*.**

of that controversy is the bankruptcy court. Yet the Circuit Court of Appeals concludes:

(11) "It is, therefore, not only his [the trustee's] right to appear in the Pennsylvania court and defend that suit, but it is his official duty, and neglect or failure to do so would be a clear breach of that duty" (R. 106).

There can be no *duty* on the trustee necessarily to appear in the Pennsylvania court, for, so long as he abstains therefrom, no action therein can become *res judicata* against him or the estate for which he is acting.

The Pennsylvania action represents only an effort by All Continent to remove the alleged cloud of the third party subpoena. Suppose it fails. It does not pass any property to the Capital Company as against the trustee; it only establishes that, as between All Continent and the Capital Company, the former is still restrained by the outstanding order of the United States District Court for the Southern District of New York.

This Court has recognized, in *Local Loan Company* v. *Hunt*, 292 U. S. 234, 241, the dangerous effects of such pre-determinations of questions by appellate courts:

"* * * As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy

> court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined."

Dicta by courts of first instance are comparatively harmless in that they are truly mere expressions of opinion. But *dicta* by appellate courts are in fact instructions to the courts within their jurisdiction. Under the Federal system, the decisions of our Circuit Courts of Appeals are final in respect of substantially all questions, and it behooves those courts to be peculiarly cautious in the avoidance of unnecessary *dicta*.

And the *dicta* for which it is the most difficult to find an excuse are those upon questions which were not even argued. Were the question present or lurking in the record, and argument had thereon, it might be easy to defend a *dictum* as useful to guide the lower courts in the future on a question on which the appellate court had had ample opportunity to reach a reasoned conclusion. But this was not the case here.

In effect, the learned court below has now taken so comprehensive and sweeping a position in respect of all the problems involved in this bankruptcy, that it appears to the trustee and to the creditors that they must now look only to this Court for appellate review meeting "the requirements of justice."

Many of the questions in this bankruptcy will presumably again and at the proper time come before the same Circuit Court of Appeals, whether on appeals from further

proceedings in the United States District Court for the Eastern District of Pennsylvania, or from the various proceedings in the bankruptcy court in the District of New Jersey, or from the plenary action now pending (pursuant to the hint as to removal from the Circuit Court of Appeals in this case) in the same United States District Court for the District of New Jersey.

If this Court does not now exercise its power to review the *dicta* of the Circuit Court of Appeals, and in explicit terms to advise and instruct the Circuit Court of Appeals and the lower courts within its jurisdiction in regard to the true rules applicable to the subject matter of those *dicta*, the whole course of future proceedings in the bankruptcy will again be subject to an appellate review which will "be inadequate to meet the requirements of justice" (*Local Loan Co.* v. *Hunt*, 292 U. S. at p. 241).[23]

Just as in the *Local Loan Company* case it was necessary for the Federal Court to intervene because the highest court of the State of Illinois had already expressed its adverse opinion, and consequently a course of hearings through the State courts of Illinois would provide a practically inadequate (although theoretically adequate) mode of relief, so here the future course of proceedings in this bankruptcy in the third circuit cannot provide a practically adequate relief to the trustee and the creditors, unless there

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[23]It is submitted that this Court is not precluded in principle even to "substitute itself as the direct appellate tribunal from *nisi prius*, in the place and stead of the Circuit Court of Appeals" (Robertson & Kirkham, "Jurisdiction of the Supreme Court", p. 210), provided the case be of an extraordinary character, as where the Circuit Court of Appeals has, by an indiscriminate use of *dicta* on points not argued, deprived itself of the capacity impartially and judicially to pass on questions that may subsequently arise out of the subject-matter of the *dicta*.

shall have been a prior exercise by this Court of its broad power to set the Circuit Court of Appeals upon the right track.

Yet the Illinois case was less serious than the present one. There the Supreme Court of Illinois had predetermined the question by a decision properly necessary to the determination of a case duly presented to it. Here, on the other hand, the appellate court in question has acted by mere *dictum*. Yet a *dictum* is scarcely less difficult to reverse in the court that has uttered it, than is a decision. He who must induce a Circuit Court of Appeals to reverse a prior deliberate expression of its opinion has assumed a task in which he faces an almost insurmountable obstacle from the outset, and in the undertaking of which he is not given practical protection by the mere availability of the argument that what was said before was *dictum*.

It is respectfully submitted that the *conduct* of the learned Court below has so far departed from the accepted and usual course of judicial proceedings as to call for exercise by this Court of its power of supervision.

CONCLUSION

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE INJUNCTION OF THE DISTRICT COURT REINSTATED. THE PREJUDICIAL *DICTA* OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVIEWED AND MODIFIED.

Respectfully submitted,

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March, 1937.

APPENDIX

Bankruptcy Act, § 21(a)

(Act of Cong., Feb. 5, 1903, c. 487 § 7, 32 Stat. 797, 798; 11 U. S. C. § 44(a))

"(a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided* that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

Judicial Code § 28

(Act of Cong., March 3, 1887, c. 373, § 2, 24 Stat. 552, 553, corrected and re-enacted by Act of Cong., August 13, 1888, c. 866, § 2, 25 Stat. 433, 435; 28 U. S. C. § 71)

"* * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. * * *"

Judicial Code § 57

(Act of Cong., March 3, 1911, c. 231, § 57, 36 Stat. 1087, 1102; 28 U. S. C. § 118)

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or

cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State, *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment

by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

New York Civil Practice Act § 781

(New York Laws, 1935, c. 630)

"Upon the service of the subpoena upon the judgment debtor or any third party who has in his or its possession property or moneys belonging to the judgment debtor or claimed by the receiver of the said judgment debtor or who is indebted to the judgment debtor, such judgment debtor or third person is hereby forbidden to transfer, pay over or otherwise dispose of such moneys or property belonging to the judgment debtor or thereafter acquired by or becoming due to him, not exempt by law from application to the satisfaction of the judgment, until the further order of the court. Any person served with said subpoena, who shall violate the provisions of such restraining provision, shall be subject to punishment by the court by fine and imprisonment or either, as and for a contempt. To effect such restraining provision, a copy of this section must be endorsed upon the copy of the subpoena served under this article."

Bankruptcy Act, § 68

(Act of Cong., July 1, 1898, c. 541, § 68, 30 Stat. 544, 565; 11 U. S. C. § 108)

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."